

## **Compliance Board Opinion 93-6**

May 18, 1993

*Mr. William H. Russell*

The Open Meetings Compliance Board has considered your complaint dated February 5, 1993, in which you allege that the Frostburg City Council improperly considered an ordinance to amend the City's Rental Housing Code at a closed meeting.

Your complaint alleges that at an open meeting on February 1, 1993, the Mayor and City Council, "without any prior discussion with the public," considered and adopted Ordinance 1993-1, which amended a section of the City's Rental Housing Code. You point out that at the preceding open meeting of the Mayor and City Council, on January 25, there was no discussion of the proposed ordinance. You indicate your understanding that an intervening closed session of the Council, on January 28, was limited to personnel matters. From this sequence of events, you express "the opinion that this piece of legislation was done behind closed doors and away from the public and perhaps was done at the January 28 closed ... meeting, and we feel that this is a violation of the State of Maryland Open Meetings laws."

In a timely response on behalf of the city, Mayor Harry G. Bowman recited the history of Ordinance 1993-1. Mayor Bowman indicates that certain perceived problems with the existing code were discussed first between the City Housing Inspector and the City Administrator, Mr. Michael Monahan, and later between Mayor Monahan and the Mayor. "As Mayor I then instructed Mr. Monahan to send a memo with the suggested changes to all Council members. Subsequently, Mr. Monahan talked to three out of four Council members, individually, about the housing inspector's problems and the staff's recommendation to correct the situation."

Then, on the afternoon of the City Council's January 28 closed session, the City Administrator met with the City Attorney to obtain legal advice on pending legal issues, one of which concerned the proposed ordinance. The City Attorney made some drafting recommendations.

On the evening of January 28 the Council met in a closed session after posted public notice. According to Mayor Bowman, "the listed purpose of meeting including personnel matters, matters related to on-going negotiations and legal advice from counsel." The City Attorney, however, was not present at the meeting of January 28. Mayor Bowman's letter continues as follows:

Mr. Monahan informed the Council that he had met with the City Attorney to obtain legal advice on a number of issues. Among them, was Ordinance 1993-1. Mr. Monahan stated that the City Attorney had recommended wording revisions, and that the proper draft would be finished by the Council meeting. Mr. Monahan also outlined the legal procedures to be followed to enact any emergency legislation. At no time, did the Mayor and Council transact any public business related to this matter, nor did any member of the Council make any remarks about or discuss this issue at the executive session.

“In summary,” the Mayor concluded, “the Council as a body did not discuss this ordinance at the January 28, 1993, executive meeting, or at any other time,” except at the open session on February 1.

As an initial matter, the Compliance Board observes that the conversations described by Mayor Bowman between the Housing Inspector and the City Administrator, the City Administrator and the Mayor, and the City Administrator and individual members of the City Council were not subject to the Open Meetings Act. None of these discussions involved a meet[ing] of a “public body,” as those terms are defined in the Act. *See* §§10-502(g) and (h) of the State Government Article.

The Compliance Board is of the opinion, however, that the Act did not permit the City Administrator to discuss the ordinance at the January 28 closed session of the Council. In the Board’s view, the imparting of information about a matter, albeit unaccompanied by any discussion among the members of a public body, constitutes the “consideration or transaction of public business” with respect to that matter. §10-502(g). As the Attorney General has advised, “even preliminary stages of the decisionmaking process are encompassed by the Act.” Office of the Attorney General, *Open Meetings Act Manual* 7 (1992). A briefing is often an important part of the process by which policy is made.

The *entire* process by which the City Council considered Ordinance 1993-1 was a “legislative function,” defined to include “the process or act of ... amending a law ....” §10-502(f)(1). Legislative functions are generally required by the Act to be carried out only at an open session. §10-505. No part of this process, including the imparting of information to the Council about the ordinance and the procedures for its enactment, could permissibly be carried out in a closed session unless one of the specific exceptions in the Act were applicable.

No exception applies, here, however. Although the City Administrator was conveying legal advice that he had obtained from the City Attorney, in fact the City Council was not meeting on January 28 to “consult *with counsel* to obtain legal advice.” §10-508(a)(7) (emphasis added). Particularly in light of the questionable uses to which the prior version of this exception had been put, the Compliance Board

agrees with the Attorney General that this exception may be invoked only when the lawyer for the public body is “a genuine participant in [a] discussion” about an issue “on which the advice of the lawyer is sought and given.” *Open Meetings Act Manual* 22.

This exception, like all of the others, is to be “strictly construed in favor of open meetings of public bodies.” §10-508(c). In the view of the Compliance Board, the exception for consultation with counsel to obtain legal advice may *never* be invoked unless the lawyer is present at the meeting.

In sum, the Compliance Board finds that the Frostburg City Council violated the Open Meetings Act by transacting business with respect to Ordinance 1993-1 at its closed session on January 28, 1993.

OPEN MEETINGS COMPLIANCE BOARD

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